PERIASAMY A/L SINNAPPAN

v.

PENDAKWA RAYA

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' MAHADEV SHANKAR JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J
[CRIMINAL APPEAL NO. W-09-8-94]
4 MARCH 1996

CRIMINAL LAW: *Criminal breach of trust - Ingredients - Mens rea - Dishonest intention - Honest belief by accused that he was entitled to dispose of property - Whether a good defence - Whether offence completed upon actus reus of disposing of property - Consent by owner of property to disposal of property - Effect - Penal Code ss. 405, 409.*

CRIMINAL LAW: *Criminal breach of trust - Abetment - Abetment by instigation - Whether a separate and distinct offence - Acquittal of principal offendor - Whether necessarily led to acquittal of abettor - Penal Code ss. 107, 109, 405, 409.*

CRIMINAL PROCEDURE: *Charge - Criminal breach of trust - Whether properly framed - Section 409 Penal code - Whether divisible into two parts - Bank officer accused alleged to have committed offence while he was "an agent of the Bank and in such capacity entrusted with dominion over property" - Whether a bad charge - Whether charge to state that entrustment was made to accused "by way of his business as an agent" - Penal Code s. 409.*

WORDS & PHRASES: *"In such capacity" - Penal Code s. 409 - Whether referring to public servants.*

WORDS & PHRASES: *"By way of his business as an agent" - Penal Code s. 409 - Whether referring to persons who are professional agents and not to casual agents.*

In the Sessions Court, the first appellant, the chief executive officer of the Co-operative Central Bank Limited (the Bank), was charged with three counts of criminal breach of trust under the old s. 409 Penal Code (i.e prior to its amendment in 1993), while the second appellant, a subordinate officer of the first appellant, was charged with abetment of the offences under s. 109 of the Code read with s. 409 thereof.

The facts were that sometime in 1986 the Bank granted a loan totalling RM 20 million (the moneys) to a borrower. It was a term of the loan that the moneys would only be released upon the latter depositing with the Bank some

four million shares in a company known as FMFB. A further term stipulated, however, that this condition could be varied upon or even dispensed with by the Bank. It was common ground that, notwithstanding that no FMFB shares were deposited at the time the first appellant signed the documents releasing the moneys, the requirement for such deposit was dispensed with by the Bank soon after the moneys were released. The first appellant, nonetheless, was charged that he "*while being an agent of the Co-operative Central Bank Limited, to wit, the Chief Executive and in such capacity entrusted with dominion*" over the moneys, committed criminal breach of trust in respect of the same.

The learned Sessions Judge, having called both appellants to their defence, accepted the evidence of the first appellant, *inter alia*, that he honestly believed that everything was in order when he signed the documents, and so, acquitted him of the principal charges. The second appellant, however, was convicted, apparently upon the testimony of the first appellant that he had been deceived by the second appellant into believing that all the documents were then in order. The facts did show that at the material time, the second appellant had made a notation in the check list accompanying the documents in question to the effect that the shares were yet to be deposited, but this piece of evidence, somehow, had slipped the consideration of the Sessions Judge.

On appeal by the first appellant and the Public Prosecutor, the learned High Court Judge took a review of the evidence adduced before the trial Judge, and in the conclusion, ruled *inter alia* (i) that the acquittal of the first appellant was against the weight of evidence (ii) that the testimony of the first appellant, which the Sessions Judge had accepted as true, that he honestly believed that all the papers were in order when he signed the same, ought to be rejected (iii) that in any case the existence of such honest belief afforded no defence in law to a charge under s. 409 Penal Code and (iv) that it was a fact that the first appellant had dominion over the moneys, and as the *actus reus* of disposing of the moneys was sufficient to complete the offence of criminal breach of trust, the first appellant ought to have been found guilty of the offence. The appellate Judge, in the result, convicted the first appellant and sentenced him to 5 years' imprisonment and a fine of RM1 million in default 1 year's imprisonment. The conviction of the second appellant was confirmed, but the sentence of imprisonment thereof was reduced from 8 years to 6 years.

The appellants appealed, and before the learned Judges of the Court of Appeal, the main issues that arose were:

(i) whether the charges against the first appellant were bad in law having regard to the true import of s. 409 Penal Code.

(ii) whether, on the evidence, the trial Judge misdirected himself in law in ordering the appellants to enter upon their defence.

(iii) whether the appellate Judge adopted a wrong approach to the appeals before him, particularly in taking a review of the evidence which had been accepted as true by the trial Judge.

(iv) whether the appellate Judge was wrong in reversing the order of acquittal of the first appellant and in dismissing the second appellant's appeal against conviction.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] There are two parts to s. 409 Penal Code. The first part applies in cases where there has been entrustment of property or its dominion to a person "*in his capacity of a public servant*". The second part applies to cases of entrustment to a category of persons, including an agent "*in the way of his business*". Thus, the word "*capacity*" applies to a public servant but not to an agent.

[2] While accepting that, under the former s. 409, a single act of entrustment may constitute a man an agent within the section, it should be emphasised that for the section to bite, there must be evidence that the entrustment was made to the particular accused "*by way of his business as an agent*".

[3] Where entrustment, as here, was alleged to have been made to an agent, the offence is limited to the case of one who carries on an agency business, and does not comprehend a man who is casually entrusted with money either on one individual occasion or on a number of occasions. The section thus refers to persons who are professional agents and not to casual agents such as a company director. This being the case, the charges against the first appellant were clearly bad. Put simply, the first appellant was charged with offences unknown to law, as it stood at the material date.

[4] The offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. It follows that there can be no criminal breach of trust where the beneficial owner consents to the use of the property in a particular way.

[5] It is an implied term in every entrustment under the express or implied contract, referred to in s. 405 Penal Code, that the owner of property may give his express or implied consent to its use or disposal in a manner that differs from the original terms governing its use or disposal. In the instant case, the letter of offer (for the loan) was cast in such a way that it was subject to variation and variation was in fact made when the Bank decided to dispense with the shares. The decision of the Bank,

apart from reflecting consent, had rendered the failure to deposit the shares in question a non-issue. This aspect of the law, clearly, was overlooked by the Courts below.

[6] The question of whether there can be a valid consent subsequent to the impugned use or disposal depends upon the facts of each case. However, where facts appear as to show that there was true consent in its legal sense, as happened here, the fact that it did not precede the use or disposal cannot, in principle, make the slightest difference to the validity of such consent.

[7] The appellate Court below, in exercising its appellate jurisdiction, should give proper weight and consideration, *inter alia*, to matters such as the views of the trial Judge on the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of an appellate Court in disturbing a finding of fact arrived at by the trial Judge who had the advantage of seeing the witnesses. It ought also to note that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end.

[8] The appellate Judge, when rejecting the defence of the first appellant which had been accepted as true by the Sessions Judge, had undertaken his own assessment of the first appellant as a witness, notwithstanding that he had not had the benefit of observing him in the witness box. This is utterly wrong and smacks of an unwarranted usurpation by the appellate Judge of a role that was strictly not his. This apart, the appellate Judge had also failed to address his mind to the relevant principles governing appeals from acquittals.

[9] The appellate Judge had erred when he (i) treated the *actus reus* as completing the offence of criminal breach of trust when under s. 405 Penal Code it is only an offence when the property is converted, appropriated or disposed of with a dishonest intention (ii) dismissed out of hand the defence of honest belief and declared thereupon, contrary to the elementary principles of law, that the existence of a belief on the part of the first appellant that the papers were in order when he signed the relevant cheques was no defence in law (iii) equated negligence with dishonesty when it is settled law that under the Penal Code, negligence, even gross negligence, is not to be equated with the definition of dishonesty (iv) brushed aside the decision in *Khoo Hi Chiang v. Public Prosecutor* and not addressing his mind sufficiently thereto when the decision is an authority binding upon him.

[10] The remark by the appellate Judge that he was under a duty to reverse the Sessions Court as the decision was grossly against the weight of evidence was rather sweeping in nature and completely overlooks the

opposite proposition in *Ooi Teik Chin v. Public Prosecutor*. The remark also runs counter to his later finding that the Sessions Court had properly directed itself upon the evidence that was relevant to the issue of dishonesty. Hence, the appellate Judge was clearly wrong in reversing the Sessions Court. Such reversal, in effect, tantamounts to an interference with the decision of the trial Court after having found no misdirection therein, and that, with respect, is unsupportable.

[11] Since the charges against the first appellant were bad in law, the second appellant, accordingly, could not be guilty of abetting a non-existent offence. For this reason, both the appellants were, in truth, guilty of no offence. However, the offence of abetment, when it consists of instigation (as was the case here), constitutes a separate and distinct offence. Consequently, an abettor who instigates the commission of an offence or conspires to commit it, may still be convicted of abetment, notwithstanding that the person charged with the principal offence has been acquitted.

[12] The very fact that the second appellant made a notation on the checklist should have repelled any suggestion of misrepresentation of the true position. Clearly, the second appellant ought not to be blamed if the first appellant overlooked the said notation. In the light of this telling evidence the learned Sessions Judge ought to have directed his mind sufficiently to the point taken by the second appellant, instead of concentrating his attention solely upon the evidence that was unfavourable to the second appellant, as he did. The appellate Judge had also fallen into the same error when he failed to address his mind to this point.

[13] The approach adopted by the trial Court to the evidence before it amounts to a misdirection that has occasioned a miscarriage of justice. This aside, the evidence presented has also fallen short of establishing a case of abetment by instigation. In the circumstances, both appellants ought to have been acquitted at the close of the case for the prosecution, and the Sessions Judge, therefore, was wrong in calling for their defence. On appeal, the appellate Judge was also wrong in reversing the order of acquittal as well as in dismissing the second appellant's appeal against conviction.

Per Curiam: *Judges hearing cases of commercial crime should need no reminder that they are not knights in shining armour - latter day Gallahads - who come to rescue a financial institution from ruin. Neither are they avenging angels. They are but servants of the law, obliged to decide cases in accordance with well established principles as applied to the evidence before them, and they ought on no account permit emotion to govern their true role.*

Per Curiam: *It is a matter of regret that the learned appellate Judge, instead of applying his mind to the essential issues in the appeals before him, wasted his time and energy upon wholly irrelevant matters, including revealing about his visit to Australia and the information he had acquired there. It is our earnest hope that it will not be our misfortune in any future case to express the view we have done here.*

[Appeals allowed. Appellants acquitted and discharged]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG JENAYAH: *Pecah amanah jenayah - Unsur-unsur - Mens rea - Niat tidak jujur - Kepercayaan jujur oleh tertuduh bahawa beliau berhak untuk melupus hartanah - Samada satu pembelaan yang mencukupi - Samada kesalahan terbentuk semata-mata atas actus reus pelupusan harta - Kebenaran tuanpunya hartanah kepada pelupusan hartanah - Kesan - Kanun Keseksaan ss. 405, 409.*

UNDANG-UNDANG JENAYAH: *Pecah amanah jenayah - Persubahatan - Persubahatan melalui hasutan - Samada kesalahan yang berasingan dan tersendiri - Pembebasan pesalah utama - Samada semestinya membawa kepada pembebasan pensubahat - Kanun Keseksaan ss. 107, 109, 405, 409.*

PROSEDUR JENAYAH: *Pertuduhan - Pecah amanah jenayah - Samada dirangka dengan tepatnya - Seksyen 409 Kanun Keseksaan - Samada terbahagi kepada dua bahagian - Pegawai Bank tertuduh dituduh melakukan kesalahan selaku "agent of the Bank and in such capacity entrusted with dominion over property" - Samada satu pertuduhan yang salah - Samada pertuduhan perlu menyatakan bahawa tertuduh diberi amanah "by way of his business as an agent" - Kanun Keseksaan s. 409.*

PERKATAAN & ISTILAH: *"In such capacity" - Kanun Keseksaan s. 409 - Samada merujuk kepada pengkhidmat awam.*

PERKATAAN & ISTILAH: *"By way of his business as an agent" - Kanun Keseksaan s. 409 - Samada merujuk kepada ejen-ejen profesional dan bukannya kepada ejen-ejen biasa.*

Dalam Mahkamah Sesyen, perayu pertama, yang merupakan Ketua Ekskutif Co-operative Central Bank Limited (Bank), telah dituduh dengan tiga kesalahan pecah amanah jenayah di bawah s. 409 lama Kanun Keseksaan (iaitu sebelum ianya dipinda pada tahun 1993), sementara perayu kedua, seorang pegawai bawahan perayu pertama, telah dituduh dengan kesalahan bersubahat di bawah s. 107 dibaca dengan s. 409 Kanun berkenaan.

Fakta-faktanya ialah pada tahun 1986 pihak Bank telah memberi pinjaman kepada seorang peminjam berjumlah RM20 juta (wang tersebut). Satu terma pinjaman itu menyebut bahawa wang tersebut akan hanya dilepaskan setelah

peminjam mendepositkan dengan Bank empat juta saham sebuah syarikat yang dikenali sebagai FMFB. Bagaimanapun, satu terma yang lain menetapkan bahawa syarat ini boleh diubah, dan malah boleh juga dimansuhkan oleh Bank. Adalah tidak dinafikan bahawa, walaupun tiada saham FMFB didepositkan oleh peminjam sewaktu perayu pertama menandatangani dokumen-dokumen bagi melupuskan wang tersebut, keperluan deposit ini telah dimansuhkan oleh Bank sejurus setelah wang tersebut dilupuskan. Perayu pertama, namun begitu, telah dituduh bahawa beliau *"while being an agent of the Co-operative Central Bank Limited, to wit, the Chief Executive and in such capacity entrusted with dominion"* ke atas wang tersebut, telah melakukan pecah amanah terhadapnya.

Hakim Mahkamah sesyen yang bijaksana, setelah memanggil kedua perayu untuk membela diri, telah menerima keterangan perayu pertama, *inter alia,* bahawa beliau dengan jujurnya percaya bahawa semua perkara adalah teratur ketika menandatangani dokumen-dokumen berkaitan, dan oleh itu, membebaskannya dari semua tuduhan. Perayu kedua, sebaliknya, telah disabitkan, kelihatannya atas keterangan perayu pertama bahawa beliau telah ditipu oleh perayu kedua untuk mempercayai bahawa pada waktu itu semua dokumen adalah teratur. Fakta, namun begitu, ada menunjukkan bahawa perayu kedua telah membuat catatan dalam senarai yang mengiringi dokumen-dokumen berkenaan, bahawa saham-saham yang berkaitan masih belum didepositkan, tetapi keterangan mengenai catatan ini, entah bagaimana, telah tidak dipertimbangkan oleh Hakim Sesyen.

Berikutan rayuan oleh perayu pertama dan Pendakwa Raya, Hakim Mahkamah Tinggi yang bijaksana telah mengkaji semula keterangan yang diberikan dihadapan Hakim perbicaraan, dan sebagai rumusannya, memutuskan *inter alia* (i) bahawa pembebasan perayu pertama adalah bercanggah dengan keterangan (ii) bahawa testimoni perayu pertama, yang diterima sebagai benar oleh Hakim Sesyen, bahawa dia dengan jujurnya percaya bahawa kesemua dokumen adalah teratur sewaktu dokumen-dokumen tersebut ditandatanganinya, harus ditolak (iii) bahawa, walau apa pun, wujudnya kepercayaan sedemikian bukanlah merupakan satu pembelaan di sisi undang-undang kepada pertuduhan di bawah s. 409 Kanun Keseksaan dan (iv) bahawa ianya adalah satu hakikat bahawa perayu pertama mempunyai penguasaan ke atas wang tersebut, dan oleh kerana *actus reus* dalam melupuskannya adalah memadai untuk membentuk kesalahan pecah amanah jenayah, perayu pertama dengan itu haruslah di dapati bersalah. Hakim rayuan, oleh hal yang demikian, telah mensabitkan perayu pertama dan menjatuhkan ke atasnya hukuman 5 tahun penjara dan denda sebanyak RM1 juta jika tidak bayar 1 tahun penjara. Sabitan ke atas perayu kedua, sementara itu, telah disahkan tetapi hukuman penjara terhadapnya dikurangkan dari 8 tahun kepada 6 tahun.

Kedua-dua perayu telah merayu dan dihadapan Hakim-hakim Mahkamah Rayuan yang bijaksana, isu-isu utama yang berbangkit ialah:

(i) Samada pertuduhan terhadap perayu pertama merupakan pertuduhan yang salah dan tidak sempurna di sisi undang-undang mengambil kira penggunaan sebenar s. 409 Kanun Keseksaan.

(ii) Samada, di atas keterangan, Hakim perbicaraan telah tersalah arah apabila memerintahkan kedua-dua perayu untuk membela diri.

(iii) Samada Hakim rayuan menerimapakai pendekatan yang salah terhadap rayuan-rayuan di hadapannya, terutama sekali apabila beliau mengkaji semula keterangan yang telah pun diterima sebagai benar oleh Hakim perbicaraan.

(iv) Samada Hakim rayuan telah silap apabila beliau mengakaskan perintah pembebasan perayu pertama dan menolak rayuan perayu kedua terhadap sabitan.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Terdapat dua bahagian kepada s. 409 Kanun Keseksaan. Bahagian pertama terpakai dalam kes-kes di mana telah berlaku amanah hartanah atau penguasaannya kepada seseorang *"in his capacity of a public servant"*. Bahagian kedua terpakai kepada kes-kes amanah kepada satu kategori orang-orang, termasuk ejen *"in the way of his business"*. Dengan itu perkataan *"capacity"* terpakai kepada pengkhidmat awam tetapi bukannya kepada seorang ejen.

[2] Sementara menerima hakikat, bahawa di bawah s. 409 yang lama, satu perbuatan amanah sahaja sudah boleh menjadikan seseorang itu seorang ejen dalam lingkungan maksud seksyen tersebut, ianya harus ditegaskan bahawa bagi seksyen itu mengena pada sasarannya haruslah terdapat keterangan bahawa amanah tersebut telah dibuat kepada tertuduh *"by way of his business as an agent"*.

[3] Di mana amanah, sebagaimana halnya di sini, telah dikatakan dibuat kepada seorang ejen, kesalahan adalah terhad kepada seseorang yang menjalankan perniagaan ejensi, dan tidak merangkumi seseorang yang secara kasual diamanahkan dengan wang samada pada satu ketika sahaja atau pada beberapa ketika. Seksyen berkenaan dengan itu merujuk kepada orang-orang yang merupakan ejen profesional dan bukannya kepada ejen-ejen biasa seperti seorang pengarah syarikat. Dalam halkeadaan ini, tuduhan-tuduhan terhadap perayu pertama adalah jelas tidak sempurna dan salah. Dikatakan secara mudah, perayu pertama telah dituduh dengan kesalahan-kesalahan yang tidak diketahui oleh undang-undang, sebagaimana ianya wujud pada ketika yang material itu.

[4] Kesalahan pecah amanah jenayah adalah satu kesalahan yang ditujukan terhadap pemilik benefisial hartanah tersebut. Ianya dengan itu mengikut, bahawa tidak mungkin berlaku pecah amanah jenayah di mana pemilik benefisial membenarkan penggunaan hartanah tersebut dalam sesuatu cara yang khusus.

[5] Ianya merupakan terma yang tersirat dalam setiap amanah di bawah sesuatu kontrak nyata atau tersirat, dirujuk dalam s. 405 Kanun Keseksaan, bahawa pemilik hartanah boleh memberi kebenaran nyata atau tersiratnya kepada penggunaan atau pelupusan hartanahnya itu menurut cara yang berbeza daripada terma-terma asal yang menguasai penggunaan atau pelupusannya. Dalam kes semasa, surat tawaran (untuk pinjaman) berkenaan telah dirangka dengan begitu rupa sehingga menyebabkan ianya tertakluk kepada perubahan (variasi) dan perubahan pada hakikatnya telah dibuat bilamana pihak Bank memutuskan untuk melepaskan saham-saham yang terbabit. Keputusan pihak Bank ini, selain mencerminkan persetujuan atau kebenaran, telah menyebabkan kegagalan untuk mendepositkan saham-saham sebagai satu non-issue. Aspek undang-undang ini, jelas telah tidak diperhatikan oleh Mahkamah dibawah.

[6] Persoalan samada persetujuan yang diberikan setelah berlaku penggunaan atau pelupusan hartanah sah atau pun tidak adalah bergantung kepada fakta kes. Bagaimanapun, bilamana fakta menunjukkan bahawa terdapat keizinan atau persetujuan yang sebenarnya di sisi undang-undang, sepertimana yang berlaku di sini, fakta bahawa keizinan atau persetujuan tersebut tidak diberikan sebelum penggunaan atau pelupusan, dari segi prinsipnya, samasekali tidak boleh menjejaskan keesahan persetujuan berkenaan.

[7] Mahkamah rayuan di bawah, dalam melaksanakan budibicara rayuannya, harus memberikan tekanan dan pertimbangan sewajarnya kepada perkara-perkara seperti pendapat Hakim perbicaraan mengenai kebolehpercayaan saksi-saksi, tanggapan ketakbersalahan tertuduh, hak tertuduh kepada faedah apa-apa kesangsian yang wujud, serta kekurangsudian sesebuah Mahkamah rayuan untuk mengganggu keputusan fakta yang dicapai oleh Hakim perbicaraan yang mempunyai kelebihan melihat saksi-saksi. Ianya harus juga ingat bahawa dalam sesuatu rayuan terhadap perintah pembebasan, tanggapan ketakbersalahan tertuduh berterusan hingga keakhirnya.

[8] Hakim rayuan, apabila menolak pembelaan perayu pertama yang telah diterima sebagai benar oleh Hakim Sesyen, telah membuat penilaiannya yang tersendiri terhadap perayu pertama sebagai seorang saksi, tanpa menghiraukan bahawa beliau tidak berpeluang untuk melihatnya di kandang saksi. Ini adalah sesungguhnya salah dan merupakan satu rampasan tidak

wajar terhadap satu peranan yang sekali-kali adalah bukan peranannya. Lebih dari itu, Hakim rayuan juga jelas tidak mengambil kira prinsip-prinsip relevan yang menguasai rayuan-rayuan terhadap perintah pembebasan.

[9] Hakim rayuan adalah silap bilamana beliau (i) menganggap *actus reus* sebagai memadai untuk membentuk kesalahan pecah amanah jenayah sedangkan di bawah s. 405 Kanun Keseksaan ianya hanya satu kesalahan bilamana harta tersebut ditukarkan, digunakan atau dilupuskan dengan niat yang tidak jujur (ii) menolak terus pembelaan kepercayaan jujur dan mengistiharkan selepas itu, bertentangan dengan prinsip-prinsip elementari undang-undang, bahawa wujudnya kepercayaan jujur di pihak perayu pertama bahawa semua dokumen adalah teratur bilamana beliau menandatangani cek-cek berkenaan bukanlah merupakan satu pembelaan di sisi undang-undang (iii) menyamakan kecuaian dengan ketidakjujuran sedangkan ianya merupakan undang-undang yang terpakai bahawa di bawah Kanun Keseksaan kecuaian, bagaimana serius sekalipun, tidak boleh disamakan dengan definasi ketidakjujuran dan (iv) mengenepikan begitu sahaja keputusan dalam kes *Khoo Hi Chiang v. Public Prosecuto*r dan tidak merujuk kepada kes itu dengan sewajarnya sedangkan kes tersebut adalah autoriti yang mengikatnya.

[10] Kenyataan Hakim rayuan bahawa beliau berkewajipan untuk mengakaskan keputusan Mahkamah Sesyen oleh kerana keputusan Mahkamah tersebut amat bertentangan dengan keterangan adalah bersifat terlalu umum dan menyeluruh dan samasekali tidak menghiraukan keputusan dalam *Ooi Teik Chin v. Public Prosecutor,* yang mana adalah autoriti bagi proposisi yang bertentangan. Kenyataan ini juga adalah bertentangan dengan keputusannya yang terkemudian bahawa Mahkamah Sesyen telah mengarahkan dirinya dengan betul terhadap keterangan yang berkaitan dengan isu ketidakjujuran. Pengakasan Hakim rayuan terhadap keputusan Mahkamah Sesyen, dengan itu, adalah jelas salah. Pengakasan tersebut, secara berkesannya, adalah sama seperti mengganggui keputusan Mahkamah perbicaraan selepas mendapati tiada salah-arahan di situ, dan tindakan sedemikian, dengan hormat, tidak boleh disokong.

[11] Oleh kerana tuduhan-tuduhan terhadap perayu pertama adalah salah di sisi undang-undang, maka perayu kedua tentulah tidak boleh bersubahat dengan kesalahan yang tidak wujud, dan dengan itu, adalah juga tidak bersalah. Atas alasan ini, kedua-dua perayu adalah sebenarnya tidak bersalah. Walau bagaimanapun, kesalahan bersubahat, bilamana wujud dalam bentuk penghasutan (sepertimana kesnya di sini), adalah satu kesalahan yang berasingan dan tersendiri. Dengan hal yang demikian, pensubahat yang menghasut perlakuan sesuatu kesalahan, atau yang berkomplot melakukannya, masih boleh disabitkan atas persubahatan, sekalipun orang yang dituduh dengan kesalahan utama telah dibebaskan.

[12] Hakikat bahawa perayu kedua telah membuat satu notasi atau catatan pada senarai periksa seharusnya membatalkan apa jua saranan salah-nyataan mengenai kedudukan sebenar. Adalah jelas, bahawa perayu kedua tidak boleh dipersalahkan jika perayu pertama tidak melihat catatan tersebut. Memandangkan keterangan sebegini ini Hakim Sesyen yang bijaksana seharusnya mengarahkan perhatian yang secukupnya kepada halperkara yang dibangkit oleh perayu kedua, dan bukan semata-mata menumpukan pemikirannya kepada keterangan yang tidak memihak kepada perayu kedua, sepertimana yang beliau lakukan. Hakim rayuan juga telah melakukan kesilapan yang sama apabila beliau gagal mengarahkan perhatiannya kepada butiran ini.

[13] Pendekatan yang diterimapakai oleh Mahkamah perbicaran kepada keterangan yang terdapat dihadapannya membawa kepada satu salah-arahan yang telah menyebabkan salah laksana keadilan. Di samping itu, keterangan yang dimajukan juga gagal untuk menentukan satu kes persubahatan melalui penghasutan. Dalam halkeadaan yang sedemikian, kedua-dua perayu seharusnya dibebaskan pada penutup kes pendakwaan, dan Hakim Sesyen adalah silap apabila memanggil kedua-duanya untuk membela diri. Di atas rayuan, Hakim rayuan juga telah silap apabila mengakaskan perintah pembebasan dan menolak rayuan perayu kedua terhadap sabitannya.

Per curiam: *Hakim-hakim yang mendengar kes-kes jenayah komersial tidak memerlukan peringatan bahawa mereka bukanlah merupakan wira yang datang untuk menyelamatkan institusi-institusi kewangan daripada musnah. Mereka juga bukanlah berperanan sebagai penuntut bela. Mereka hanyalah pengkhidmat undang-undang, yang berkewajipan untuk memutuskan kes-kes berdasarkan prinsip-prinsip yang telah tertanam dengan kukuhnya sebagaimana yang terpakai kepada keterangan di hadapan mereka, dan mereka tidak boleh samasekali membenarkan emosi menguasai peranan mereka itu.*

Per curiam: *Adalah merupakan perkara yang amat dikesali bahawa Hakim rayuan yang bijaksana, yang sepatutnya menumpukan pemikirannya kepada isu-isu yang penting dalam rayuan-rayuan di hadapannya, telah membuang masa serta tenaga memikirkan perkara-perkara yang sesungguhnya tak relevan termasuk menceritakan tentang lawatannya ke Australia serta maklumat yang beliau perolehi di sana. Adalah amat diharapkan bahawa dalam kes-kes yang akan datang tidak perlu lagi bagi kami untuk membuat komen sepertimana yang kami buat di sini.*

[Rayuan dibenarkan. Kedua-dua perayu dibebaskan]

Cases referred to:
Yap Sing Hock & Anor. v. Public Prosecutor [1992] 2 MLJ 714 ***(foll)***
Cooray v. The Queen [1953] AC 407 ***(foll)***
R.K. Dalmia v. The Delhi Administration AIR 1962 SC 1821 ***(not foll)***
Mat v. Public Prosecutor [1963] MLJ 263 ***(foll)***
Mahadi v. Public Prosecutor [1970] 1 MLJ 16 ***(cit)***
Lim Kheak Teong v. Public Prosecutor [1985] 1 MLJ 38 ***(refd)***
Wilayat Khan v. The State of Uttar Pradesh AIR 1953 SC 122 ***(refd)***
Ooi Teik Chin v. Public Prosecutor [1971] 1 MLJ 51 ***(foll)***
Public Prosecutor v. Mohamed bin Abdul Jabbar [1948-49] MLJ Supp. 74
Kee Kim Chooi & Ors. v. Public Prosecutor [1952] MLJ 180 ***(not foll)***
Faguna Kanta Nath v. The State of Assam AIR 1959 SC 673 ***(foll)***
Public Prosecutor v. Yeoh Teck Chye v. Public Prosecutor [1981] 2 MLJ 176 ***(dist)***
Yeow Fook Yuen v. Regina [1965] 2 MLJ 80 ***(dist)***
Mangal Sen v. Emperor AIR 1930 Lah 57 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Penal Code ss. 107, 109, 405, 409
Penal Code, Ceylon ss. 392, 398, 406

For the appellant - C.V. Das (Dato' Radzi Sheikh Ahmad & K.P. Gengadharan with him); M/s. Kayveas & Co.
For the respondent - Mohd Yusof bin Haji Zainal Abidin, DPP

JUDGMENT

Gopal Sri Ram JCA:

We heard and allowed these appeals on 4 September 1995. The reasons for our decision now follow.

Facts and background

Periasamy s/o Sinnappan, whom we shall, throughout this judgment, refer to as the first appellant, was charged in the Sessions Court at Kuala Lumpur on three counts of criminal breach of trust. Balakrishnan s/o Nalliah, whom we shall we shall refer to as the second appellant, was charged with three counts of abetting the first appellant in the commission of the principal offence. The appellants were jointly tried. For completeness, we will set out the amended charges framed against each appellant.

As against the first appellant the following charges were framed.

First Charge

That you on 11 July 1986 at the Cooperative Central Bank Limited, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Bank Limited, to wit, the Chief Executive and in such capacity entrusted with dominion over certain property, to wit, M$16,004,159.68, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

Second Charge

That you on 11 July 1986 at the Cooperative Central Bank Limited, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Bank Limited, to wit, the Chief Executive and in such capacity entrusted with dominion over certain property, to wit, M$2,000,000,00 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

Third Charge

That you on 16 July 1986 at the Cooperative Central Bank Limited, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Limited, to wit, the Chief Executive and in such capacity entrusted with dominion over certain property, to wit, M$1,995,837,10, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

The charges framed against the second appellant read as follows:

First Charge

That you, between 14 June 1986 and 11 July 1986 at the Cooperative Central Bank Limited, 107, Jalan Bunus in the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, M$16,004,159.68 belonging to the Cooperative Central Bank Limited by an agent, namely, Periasamy s/o Sinnapan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 109 and s. 409 of the Penal Code.

Second Charge

That you, between 14 June 1986 and 11 July 1986 at the Cooperative Bank Limited, 107, Jalan Bunus in the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, M$2,000,000.00 belonging to the Cooperative Central Bank Limited by an agent, namely, Periasamy s/o Sinnapan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 109 and s. 409 of the Penal Code.

Third Charge

That you, between 14 June 1986 and the 16 July 1986 at the Cooperative Central Bank Limited, 107, Jalan Bunus in the Federal Territory of Kuala Lumpur abetted the commission of the offence of criminal breach of trust of certain property, to wit, M$1,995,837.10 belonging to the Cooperative Central Bank Limited by an agent, namely Periasamy s/o Sinnapan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 109 and s. 409 of the Penal Code.

The facts relevant to the case against both appellants may be shortly stated.

The Cooperative Central Bank Limited, or CCB, as it was more popularly known, was not a bank at all. It was a cooperative society established under the provisions of the Cooperative Societies Act, 1948. We will, however, for convenience, refer to it in this judgment as "the Bank". At all material times, the first appellant was the Chief Executive of the Bank, while the second appellant was its Assistant General Manager, Credit Division. From the evidence recorded at the trial and from the comments of the Sessions Judge and the appellate Judge, it appears that the Bank was, to say the very least, poorly managed by those having *de facto* management of it.

As to the circumstances in which the first appellant joined the Bank and his position therein, it is, we think, appropriate to quote from the judgment of the learned Sessions Judge. This is what he said:

> The 1st accused besides being a law practitioner was appointed to be a member of the Board of Directors of CCB in 1981 and as a member of Working Committe and later as a Chairman of the Management Committee. On 26 May 1986 the 1st accused was appointed as Chief Executive and on 11 and 16 July 19986 he was alleged to have committed criminal breach of trust.
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> The 1st accused became the Chief Executive on the encouragement and insistence of the former Chief Executive by the name of Mathimugam.
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> Later the 1st accused discovered that he was deceived by Mathimugam as to the fact that CCB was a Cooperative of solid financial standing, with an efficient administration and suitable enough for 1st accused to take over from as to enable him (Mathimugam) to be active in the international co-operative movement. It is no wonder the 1st accused never had an office nor an assistant, because Mathimugam was still in power and still occupied the Chief Executive's room. There was friction then, between Mathimugam and the 1st accused.

It is clear from the foregoing passages that the Sessions Judge accepted as a fact that, although the first appellant bore the glorified title of "Chief Executive", the real executive power lay in the hands of Mathimugam, the Bank's former Chief Executive. Mathimugam, by all accounts made available to the Sessions Court, ran the Bank as if it were his own; a man of extreme criminal cunning, who has, with much success, thwarted all attempts to have him extradited from Australia.

In June 1986, three applications for a facility totalling RM20 million were made by one Looi Thiam Aik ("Looi") to the Bank. Though made in his name, the loan was, in reality required by his relatives. The evidence reveals that the three applications came through Mathimugam to the second appellant with instructions from the former to the latter that they be speedily processed and placed before the Working Committee for its approval. It is common ground that these three applications were indeed speedily processed through the several departments of the Bank and approved by its Working Committee and later confirmed by the Board or Directors.

On 30 June 1986, the Bank wrote a letter to Looi making an offer of the loan facility on an overdraft basis. It was signed by both appellants and contained the terms upon which the offer was being made. One of the conditions for the grant of the loan expressed in the offer was that the borrower shall deposit by way of a pledge, 4 million shares in First Malaysia Finance Bhd. However, the letter, in its opening paragraph, made it amply clear that the terms contained therein could be altered or amended or withdrawn at the Bank's discretion. This offer was accepted by Looi.

Later, the necessary accounting and other internal documents for the release of the moneys comprised in the loan were prepared and approved by the first appellant. However, it transpired that the shares in question had not been deposited when the loan was released.

On 23 July 1986, that is to say, after the release of the loan, the Bank's Management Committe chaired by Mathimugam met and decided to dispense with the condition that required the deposit of the 4 million shares. There is no dispute - indeed it is common ground - that the Management Committe was empowered to do so.

It is against this factual matrix that the charges earlier adverted to were framed against the appellants.

At the close of the case for the prosecution, the Sessions Judge called upon the appellants to enter upon their defence. Then, having heard their evidence and submissions made for and against them, he acquitted the first appellant on the principal charges but convicted the second appellant on the charges of abetment and sentenced him to a term of 8 years on each charge.

The second appellant then appealed against his conviction while the prosecution appealed against the acquittal of the first appellant. Both appeals came before Syed Ahmad Idid J who, in a reserved judgment, affirmed the order of conviction against the second appellant, reversed the order of acquittal in favour of the first appellant and entered an order of conviction against him. He also made the following orders in respect of sentence:

(1) As against the first appellant:

(a) a term of five years imprisonment and a fine of RM1 million, in default a further term of one year's imprisonment, on the first charge; and

(b) a term of two years imprisonment and a fine of RM200,000 on each of the second and third charges;

(2) As against the second appellant, the sentence was reduced to a term of imprisonment of six years.

The learned Judge also ordered all sentences to run concurrently.

It is against these orders that the present appeals are directed.

The Case for the First Appellant

(A) The charge of criminal breach of trust

Prior to its amendment in 1993, s. 409 of the Penal Code read as follows:

> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The amendments made by Parliament to the section in 1993 have no application to these appeals as they came into force well after the alleged commision of the offences with which the appellants were charged.

It may be seen at once that the section is in two parts. The first part applies in cases where there has been estrustment of property or its dominion to a person - to quate the words of the section - "in his capacity of a public servant". The second part of the section applies to cases of entrustment to a category of persons, including an agent - again to quate the section - "in the way of his business". Thus, the word "capacity" applies to a public servant but not to an agent.

That the bifurcation we have alluded to existed in the section as it was previously cast was given judicial recognition by the Supreme Court in *Yap Sing Hock & Anor. v. Public Prosecutor* [1992] 2 MLJ 714 Peh Swee Chin SCJ who delivered the judgment of the Supreme Court on that occasion made the following observation (at page 725 of the report):

> The modifying words 'in his capacity' refer to a public servant and the words 'in the way of his business' refer to 'banker, agent ...' Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to serious arguments in Court.

In *Cooray v. The Queen* [1953] AC 407, the appellant was convicted of an offence under s. 392 of the Penal Code of Ceylon which is in *totidem verbis* s. 409 of our Penal Code. The charge recited that the appellant, Cooray, had been entrusted with certain moneys, "in the way of his business as an agent". On appeal to the Privy Council, the Board, at the conclusion of arguments, allowed the appeal and substituted a conviction under s. 389 of the Ceylon Code, which provision is indentical to s. 406 of our Code.

Later, when delivering the written advice of the Judicial Committe, Lord Porter made certain obsevations about the way in which the equipollent of s. 409 is to be applied. We find it necessary to quote from his judgment at length.

After setting out the gamut of sections among which s. 392 was to be found, his Lordship said (at page 415):

> The question for their Lordship, therefore, is in the first instance whether the appellant is a member of the class or one of the classes embraced in s. 392, or otherwise included amongst those referred to in the section. It was held in the Courts of Ceylon, and is maintained by the respondent, that the appellant was entrusted with property in the way of his business as an agent and converted it to his own use and consequently comes directly within the words of the statute. On the other hand, the appellant maintains that the offence is limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual ocassion or, indeed, on a number of ocassions, provided that the evidence does not establish that he carries on an agency business. In the present case it is maintained, no agency business was carried on: the appellant merely received certain sums of money and kept them temporarily, having provided for their ultimate payments by the encashment of his cheques.
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> The correctness of these contentions depends on the true construction of the language quoted. For the appellant his submission is put in two ways. Firstly, it is said that whatever might have been the result if the words 'in the way of his 'business'' were omitted, their presence excludes the posibility of anyone who does not carry on an agency business coming within the section inasmuch as no one can misappropriate money 'in his business' unless he is engaged in a business of some sort: a man may casually misappropriate money and be guilty under ss. 388 and 389, but he cannot be included in the limited classes struck at in s. 392 unless he is a member of one of the categories referred to.

Having thus indentified the issues in the case and the appellant's submissions upon them, Lord Porter went on to say as follows (at page 417):

> The argument that the subsection comprehends only those engaged in a particular occupation does not lack authority in England. It is supported by three cases spread over a period of time from *Rex v. Prince* [1827] 2 C & P 517 to *Reg. v. Portugal* [1885] 16 QBD 487 and *Reg. v. Kane* [1901] 1 QB 472. The principle is perhaps most clearly enumerated in the second of these cases where it is said:
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> > It was contended by the Crown, that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not instrusted with either sum of money in any of those capacities, yet he came within the term, 'other agent instrusted with 'money or valuable security' within the meaning of s. 75. To this it was answered that, if that contention of the Crown be correct, the section should have said, 'whosoever, having been intrusted as agent with any money,' etc.; that no interpretation or effect would be given to the words 'banker, merchant, broker, or attorney;' and that, it was obvious that some effect must be given to those words, if possible, in construing the section, for otherwise the section might be held to apply to everybody instrusted with money to be applied as by the section is provided. In this we agree. We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe,

> after in ealier sections classifying various places and things from and of which larceny may be committed, - see ss. 31, 38, 40, 50, 60, 62 and 63 - proceeds to specify certain classes of persons who may be guilty of the offences therein described; for instance, from s. 67 to s. 73, clerks, servants, or persons in the public service are classified; in s. 74, tenants and lodgers are classified; and in s. 74, tenants and lodgers are classified; and in s. 75 and afterwards the class aimed at is that of agents, bankers, factor. In our judgment s. 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out.

So far the reasoning is directly applicable to the case under consideration, subject to such immaterial variations as the provisions of the Acts require. It is true that the Judges who tried the case went on to place some reliance on the fact that the English Act 24 & 25 Vict. c. 96, s. 75, uses the words 'banker, merchant, broker, attorney, or *other* agent' and to draw the inference therefrom that the agent must, like the preceding types, form one of a class. But this is only an additional ground for their decision and is merely used as a support of the view which they already entertained. *Kane's* case in the Court of Crown Cases Reserved followed *Reg. v. Portugal,* though that Court was not bound by the earlier decision. Save to this extent it does not add any further support to it.

It was argued on behalf of the Crown that the word 'attorney' has a different meaning in Ceylon from that which it bears in England and that the Act now under consideration does not contain the word 'other'. So far as the second matter is concerned, it is to be noted that the Ceylon Penal Code does include the phrase 'in his business,' and in their Lordships' view this expression is at least as important as the word 'other' in the English Act. So far as the word 'attorney' is concerned their Lordships would point out that the wording of the Ceylon Act is obviously taken direct from the Larceny Act, 1812, 52 Geo. 3, c. 63, s. 2, which is repeated in 24 & 25 Vict. c. 96, s. 75.

In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the Courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this Board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial Courts should adopt the contruction put upon the words by the English Courts - see *Trimble v. Hill* [1879] 5 App. Cas. 342. It is true that in that case the decision referred to was one given by the Court of Appeal and that the Courts which it was said should follow it were Courts of a colony, but in their Lordships' view English Courts should themselves conform to the same rule where there has been a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the Courts of a member of the British Commonwealth of Nations a similar course should be followed.

In enunciating the construction which they have placed on s. 392 they would point out that they are in no way impugning the decisions in certain cases that one act of trustment may constitute a man a factor for another provided he is

> entrusted in his business as a mercantile agent, nor are they deciding what activity is required to establish that an individual is carrying on the business of an agent. In the present case the appellant clearly was not doing so, and was in no sense entitled to receive the money entrusted to him in any capacity, nor, indeed, had Mr. Ranatunga authority to make him agent to hand it over to the bank.

In *R.K. Dalmia v. The Delhi Administration AIR* 1962 SC 1821, the appellant, Dalmia, was charged with criminal breach of trust under s. 409 of the Penal Code, which is in terms identical to our s. 409 before the latter's amendment. The charge alleged that the offence was committed as "an agent in your capacity as Chairman and the Principal officer of the Bharat Insurance Co. Ltd.". It was argued, relying upon *Cooray (supra),* that the appellant was not an "agent" within s. 409 as he was not a professional agent carrying on the business of agency. The Supreme Court of India rejected this submission.

Raghubar Dayal J, who delivered the judgment of the Court said:

> What s. 409 IPC requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of s. 409, IPC if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *Reg v. Portugal,* [1885] 16 QBD 487 or in *Cooray's* case, [1953] AC 407, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity', to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in ss. 406 to 408 IPC.

With respect, we are unable to accept the interpretation placed upon the section by their Lordships of the Indian Supreme Court. To adopt the view expressed in the passage above quoted would, in our judgment be tantamount to rewriting the section by means of an unauthorised legislative act. We would, therefore, with respect, prefer the reasoning of the Board in *Cooray.*

While accepting that, under the former s. 409, a single act of entrustment may constitute a man an agent within the section, we would emphasise that for

the section to bite, there **must** be evidence that the entrustment was made to the particular accused by way of his business as an agent.

By way of illustration, the managing director of a company who, either by his contract with his company or by general law, is entrusted with dominion over his company's property is not to be presumed to be falling within the terms of s. 409 by reason of that fact alone. A managing director of a company has, no doubt, been held by the general law to be an agent of the company; but he cannot, upon that sole consideration, be held to have been entrusted in the way of his business as an agent. In other words, the section refers, as was contendend at the bar of the Privy Council in *Cooray,* to persons who are professional agents and not to casual agents, such as a company director.

We have dealt with this point because we notice from the charges framed against the first appellant that he was charged with "being an agent of the Cooperative Central Bank Limited, to wit, the Chief Executive and **in such capacity** entrusted with dominion over certain property" etc. On the authority of *Yap Sing Hock* and *Cooray,* the charges against the first appellant were clearly bad.

Even if - and we use this expression advisedly - the charges against the first appellant had been amended at the close of the case for the prosecution to accord with the language of s. 409, it would not have mattered a jot; for the evidence led at the trial did not establish the ingredient that the entrustment to the first appellant was **in the way of his business** as an agent.

It is unfortunate that these matters were overlooked by all concerned during the proceedings in both the Courts below. Had those charged with the adjudicatory function at both levels, in particular the learned appellate Judge, properly addressed their minds to the relevant law instead of being unduly concerned with the haphazard manner in which the Bank was being run, it is unlikely that such an elementary point would have been missed.

The conviction on appeal

In acquitting the first appellant after having wrongly called upon his defence, the Sessions Judge had this to say:

> From the whole evidence adducced in Court, I find that the person who was responsible for the success of the application by the 3 relatives (of Looi) was Mathimugam and the officer made use of was the 2nd accused and the officer deceived was the 1st accused. I say so because Mathimugam was the Managing Director cum Chairman, Management Committee of CCB who *de facto* was more powerful than the 1st accused.
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> ...
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> **I believe the evidence of the 1st accused** that he did not know and that 2nd accused did not inform him that the FMFB shares were not yet received. As

explained earlier, 2nd accused was made use of by Mathimugam and he (2nd accused) received instructions from Mathimugam at every stage from the time the application was processed, brought into the meeting, varied the guarantee to Term Loan, varied the conditions and others. (Emphasis added)

There can be no clearer indication that the Sessions Judge believed the first appellant upon the critical issue of dishonesty. In those circumstances, there was, in our judgment, no course left open to the Sessions Judge but to acquit. The law upon the matter was made so clear by his Lordship Suffian J (as he then was) in *Mat v. Public Prosecutor* [1963] MLJ 263, that we can do better to quote his words:

The correct law for Magistrates to apply is as follows. **If you accept the expanation given by or on behalf of the accused, you must of course acquit.** But this does not entile you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisty the onus of proof which lies upon it. (Emphasis added.)

See also, *Mahadi v. Public Prosecutor* [1970] 1 MLJ 16

In the state of the law, what was the duty and function of the learned Judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.

In *Lim Kheak Teong v. Public Prosecutor* [1985] 1 MLJ 38, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act, 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s. 66 of the Courts of Judicature Act, 1964, to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court whose judgment was delivered by Hashim Yeop Sani FJ (later CJ Malaya) said:

[W]e gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell, Ag. CJ in *Rex v. Low Toh Cheng* [1941] MLJ 1, the appellate Judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russel of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate Court, in exercising the power conferred 'the **High Court should and will always give proper weight and consideration to such matters** as:

(1) the views of the trial Judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slownesss of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370, 375 where he quoted from Lord Thankerton's judgment in *Thomas v. Thomas* [1947] 1 All ER 582, that:

> Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.
>
> The learned appellate Judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? *(Thomas v. Thomas (supra)).* On the facts of this case we do not think so.

In *Wilayat Khan v. The State of Uttar Pradesh* AIR 1953 SC 122, 123, 125, Chandrasekhara Aiyar J, when delivering the judgment of Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction.
>
> But there are two points to be borne in mind in this connection. One is that **in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the and;** the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a Judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence of the facts.

We now turn to examine the way in which the appellate Judge approached the appeal against the first appellant's acquittal. By reason of the comments we propose to make later, we shall quote from his judgment *in extenso:*

> The thrust of 1st accused's submission was that he acted on 2nd accused's behest or advice or assurance. **After years as a practising solicitor; 1st accused cannot claim this to be true and accordingly I have to reject such a defence.** On

the contrary **I found 1st accused as a knowledgeable person, prim and proper when he so chooses and vigilant most of the time except in these matters which now confront him.**

In respect of the documents, Datuk Radzi said that appellant should not have signed but when he signed and certified, the respondent (1st accused) was entitled to assume that everything was in order. In the 'Box' presentation in Court, this was described as his 'minimal and peripheral involvement in the process of approval and disbursement of the loan.'

Datuk Radzi said, 'Procedures existed in CCB but not followed and that whether these were followed or not was not known to 1st accused' and added '1st accused was entitled to assume that these procedures were made.' **Such laxity or lackadaisical attitude, in the cases where legal acts are not complied with, is not a good excuse.** According to Management gurus, no one should assume but instead obtain facts and data. In our case, so long as the procedures were not complied with, it did not matter whether or not any officer thought they were.

In situations like this, it was the duty of the CE to be watchful and ensure every paper presented, every statement made in meetings of the CCB, be they meetings of the management Committee or Working Committee or any other, must be accurate, and clear. **To hold otherwise is to accept negligence as a tool of management or to encourage non-performance in leaders of corporations.** Naivety may be excused in some areas of human activities or in the very young but it cannot be so in law.

It was put to me that both accused should be found innocent as what they did merely followed the practices in CCB at that time or in other words, in a state where there is lawlessness, anyone who commits a crime on the premise he merely went along with the practices thereof is not guilty. On that premise, no one can be guilty of any crime because he obeys his environment notwithstanding that our country has rules and laws prohibiting the very acts committed. I am therefore unable to accept Counsel's suggestion.

A picture was painted of Mathimugam who, it was said, is happy (or 'hopping') somewhere in Australia. 2nd accused claimed that Mathimugam instructed him to process the loan application on 14 June 1986 and to bring it to the Working Committee on 17th and recorded the approval of the said loans, and for him to disburse on 11 and 16 July. And it was said Mathimugam dealt with and met Dato' Dr. Chen the principal personality behind the Lipkland Group. Mathimugam was styled the 'Big Boss'.

Mathimugam resigned in December 1986. I accept that 1st accused stayed on in CCB during the troubled times right to the end in a vain effort to keep CCB afloat. In contrast Mathimugam fled to Australia.

Datuk Radzi Sheikh Ahmad stated that R. Mathimugam was the force behind Looi's loan. 'It's is a wicked world and when a clever man turns his brains to crime, it is the worst of all' (A Conan Doyle in Adventure of the Speckled Band). From the evidence so far adduced, I can only agree that Mathimugam is a

diabolical character but not a genius. If he is free in Australia then it can mean that either the Malaysian Authorities did not pursue him or that the Australian Courts have not been given the full impact of the wrongdoings and crimes committed by this one character which damaged the CCB, its members and credibility.

I had declared early in the proceedings that I was going to visit Australia. I attended the 25th Biennial Conference of the International Bar Association in Melbourne about three weeks ago and learned through the mass media that the Australian Federal Police and the Immigration Department responded positively to Switzerland's Police call for assistance in connection with the deaths of 53 followers of a doomsday cult in Switzerland and Canada. In our matter, the exhibits in Appeal Records at Vol. 3 P65, P67A, P67B, P68A, P68B do not appear to be helpful in locating the individuals connected to this case. Perhaps an international arrest might have helped?

Criminals are subject to extradition and anyone who cheats or breaches trust and absconds with other person's property or money cannot hide behind politics.

What is Criminal Breach of Trust?

According to *Sathiadas v. Public Prosecutor* [1970] 2 MLJ 241 at page 243, the gist of this crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor; **it is the act itself which amounts in law to his offence.**

Section 405 Penal Code describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. And if that person dishonestly misappropriates (that property), he or she commits 'Criminal breach of trust'.

So soon as the accused certified, approved and paid out the loan, or any part of it, notwithstanding whether to an outside body or to another account within his organization and such payment was either outside the ambit of his responsibility or was unlawful, he committed the crime of Criminal Breach of trust. It does not matter whether the payout was for a split second or the amount was paid back within a few days. To hold otherwise will be to encourage officials who have dominion over money or property to misuse their positions and gamble or play the stock and shares. Such persons can then promise that they will settle the sum when the value of the shares go up or make up for the shortfall when the prices go down. That cannot represent the law.

Where the person who commits criminal breach of trust is public servant or in the way of his business a banker, merchant, factor, broker, attorney or agent, the punishment extends to 20 years' imprisonment and also liable to fine (s. 409).

Finding of Law

Despite learned Counsel's contention that it was Mathimugam who was empowered with dominion over CCB's property, evidence was clear that the 1st accused as the CE at the material time had the dominion and as such entrusted with CCB's property.

While it was not necessary for the accused persons to convince the Court of the truth of their explanation, it can only be sufficient if the explanation may reasonably be true. *Murugia v. Public Prosecutor* [1941] MLJ 16; the Court did not have to believe the defence story so long as the defence can raise some doubt. *Mahadi v. Public Prosecutor* [1970] 1 MLJ 16 or that the explanation was consistent with innocence. *Osman Khan v. Public Prosecutor* [1948] 14 MLJ 56.

Much ado has been made over the demise of *Haw Tua Tau* [1981] 2 MLJ 49 and the emergence of *Khoo Hi Chiang* [1994] 1 MLJ 265 when in reality the subordinate Courts have been observing the requirements of s. 173(f) of the Criminal Procedure Code i.e when the Court found that no case against the accused had been made out, which if unrebutted would warrant his conviction, the Court recorded an order of acquittal.

There were opposing contentions on whether the High Court can or cannot reverse the Sessions Court's decision 'on the ground of it being against the weight of evidence' (see *Public Prosecutor v. Ma'arif* [1969] 2 MLJ 65). As was rightly pointed out by Mr. Manokaran, the appellate Court usually considers the distinction between the finding of a specific fact and one where it is actually an inference from a fact. **There is no reason why a reversal should not be ordered if it was found that the decision was grossly againt the weight of the evidence.** It is, after all, the duty of the Court, in an appeal, to review all evidence presented before the lower Court *Public Prosecutor v. Vijaya Raj* [1981] 1 MLJ 43. **One matter which we need to concern ourselves is whether the Session Court Judge had given proper consideration to the facts which were immensely material towards the determination of the accused, 1st (or respondent's) and 2nd (or appellant's) intention and I am of the opinion the learned Judge did that.**

Mr. Manokaran said this Court could not rebuild the case from the debris. I am pleased to say no such operation was being conducted here. All I had were the Notes of Proceedings, the Record of Appeal and the submission/arguments in Court by the learned DPP and both learned Counsel plus the documents both in the Records as well as those designated as 'Asal' and tendered. (Emphasis added.)

Upon these passages, we make the following observations.

First, the appellate Judge when rejecting the defence of the first appellant, which had been accepted as true by the Sessions Court, undertook his own assessment of the first appellant as a witness, when he had not had the benefit of having observed him in the witness box: an advantage which the trial Judge distinctly had. This is utterly wrong and smacks of an unwarranted usurpation by the appellate Judge of a role that was strictly not his.

Second, it appears from the passages above quoted that the appellate Judge did not even bother to address his mind to the relevant principles governing appeals against acquittals. With respect, it would have been far better that he had done so instead of veering off at a tangent as he did.

Judges hearing cases of commercial crime should need no reminder that they are not knights in shining armour - latter day Gallahads - come to rescue a financial institution from ruin. Neither are they, as the appellate Judge in this case appears to have perceived his role, avenging angels. They are but servants of the law, obliged to decide cases in accordance with well established principles as applied to the evidence before them, and they ought on no account, as was done in this case, permit emotion to govern their true role. Emotion is the enemy of reason and there is little doubt that the appellate Judge in the present case allowed the former to cloud the latter. It would have been far better for him to quote from relevant decided cases rather than from well known works of fiction. Had he done so, it is quite possible that he may have decided the appeals correctly.

Third, the rather sweeping remarks of the learned appellate Judge that he was under a duty to reverse the Sessions Court when the decision was grossly against the weight of evidence clearly contradicts his later finding that the Sessions Court had properly directed itself upon the evidence that was relevant to the issue of dishonesty. To have interfered with the decision of the trial Court **after** having found no misdirection is, with respect, unsupportable. And we find it quite amazing that the inconsistency never struck the appellate Judge during the process of his reasoning.

Fourth, the learned appellate judge's direction that he was entitled to interfere because, according to him, the decision was grossly against the weight of evidence completely overlooks the decision of Lee Hun Hoe J (as he then was) in *Ooi Teik Chin v. Public Prosecutor* [1971] 1 MLJ 51 which is an authority for quite the opposite proposition. No doubt, the learned appellate Judge in the present case used the expression "grossly against"; but we do not perceive the use of the adjective does anything to detract from the true principle that applies to a case such as the present.

Fifth, the learned appellate Judge appears to have treated the *actus reus* as completing the offence of criminal breach of trust. This comes across from the following two sentences which appear in the passages above quoted:

> Loss as a consequence of the act is not a factor" it is the act itself which amounts in law to this offence. ... So soon as the accused certified, approved and paid out the loan, or any part of it, notwithstanding whether to an outside body or to another account within his organization and such payment was either outside the ambit of his responsibility or was unlawful, he committed the crime of Criminal Breach of Trust."

It is elementary law; and the appellate Judge has recognised this elsewhere in his judgment; that the offence of criminal breach of trust is not an offence of strict liability. It is only an offence, under s. 405 of the Penal Code, to convert, dispose or to appropriate property done with a **dishonest intention**. To emphasise this most important ingredient which forms the *mens rea* of the

offence, we need do no more than to quote from Sir Hari Singh Gour's Penal Law of India 10th edition, vol. 4, page 3503 which reads as follows:

> The mere violation of law or a legal contract is, however, only one element for consideration. The essential element is dishonesty. The term 'dishonesty' has been defined before, and it has frequently been the subject of discussion. It has been used here in the same sense as in ss. 378 and 403 as implying the intention of causing gain or loss by unlawful means of property to which a person gaining or losing is not or is entitled.

Sixth, the learned appellate Judge dismissed out of hand, the submission made by Dato' Radzi of Counsel for the first appellant, based on the defence of honest belief. To make matters worse, the learned appellate Judge went on to declare that the existence of a belief on the part of the first appellant that all the papers were in order when he signed the relevant cheques was no defence in law. This statement of the learned Judge is quite wrong and offends elementary principles of law. To demonstrate the error into which the learned appellate Judge fell, it suffices to quote the following passage from Nelson's Penal Code, 7th edn., page 1529:

> **No criminal breach of trust if action of the accused is in good faith**
>
> A person, who is pleading a claim or right, may be acting without dishonest intention if he is asserting *bona fide* what he believes to be a lawful claim even though it may be unfounded in law or in fact. If the accused has some claim to the property over which he still retains dominion, there would be no offence unless the claim is merely a pretence, and not *bonafide,* even if it turns out to be unsustainable in law.

Although this passage is in the context of alleged dishonest misappropriation, we see no difference in principle when the proposition is applied to a case of alleged dishonest use or disposal. A person may dispose of another's property under an honest belief that he is entitled to do so. If it later transpires that he lacked the authority he believed he had, he will not be guilty of criminal breach of trust.

Seventh, the learned appellate Judge appears to have equated negligence with dishonesty. To remind ourselves, we quote him once again:

> To hold otherwise is to accept negligence as a tool of management or to encourage non-performance in leaders of corporations.

It is settled law that negligence, even gross negligence, is not to be equated with the definition of dishonesty under the Penal Code. If any authority is required for this elementary proposition, it is to be found in *Public Prosecutor v. Mohamed bin Abdul Jabbar* [1948-49] MLJ Supp. 74.

Lastly, the learned appellate Judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang (supra).* We find the cavalier fashion in which

he approached the judgment of a five member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate Judge ought not to have brushed it aside as he did.

We may add that it does not augur well for judicial discipline, when a High Court treats the decision of the Supreme Court with little or no respect, in disobedience to the well-entrenched doctrine of *stare decisis.* We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this Court and of the Federal Court and they must, despite any misgivings a Judge may entertain as to the correctness of a particular judgment of either Court, apply the law as stated therein.

Encik Yusof, the learned Deputy who appeared for the respondent, found himself in the unenviable position of trying to support a judgment that was unsupportable. To his credit we must say that he argued the appeal with his usual skill, ability and fairness. He submitted that the Sessions Judge was wrong in not having regard to the first appellant's knowledge, drawn from the pre-utilisation check list made available to him, that the shares had not been deposited and, for that reason, the moneys were not to be released. The short answer to that argument is that the Sessions Judge accepted the evidence of the first appellant that he honestly believed that all was in order when he signed the relevant accounting documents.

For the reasons that we have given, we were satisfied that the learned appellate Judge's reversal of the Sessions Court was clearly wrong. Accordingly, the order of conviction entered against the first appellant was quashed and the sentences passed upon him were set aside.

Before we move on to consider the case of the second appellant, we must say that it is a matter of deep regret that the learned appellate Judge, instead of applying his mind to the essential issues in the appeals before him, wasted his time and energy upon wholly irrelevant matters, including revealing about his visit to Australia and the information - utterly useless to the case - he had acquired there. It is our earnest hope that it will not be our misfortune in any future case to express the views we have done here.

With that we now turn to deal with the appeal of the second appellant. We must, however, point out that in course of dealing with his appeal, it will become necessary for us to advert to propositions of law that are of relevance to the first appellant's appeal. This has been occasioned by the way in which arguments were presented in support of and in opposition to the latter appeal.

Case for the Second Appellant

It will be recalled that the second appellant was charged with three counts of having abetted the first appellant. In considering these charges we must make two matters clear.

First, all that has been said in respect of the way in which the charges were framed against the first appellant apply with equal force to the second appellant. As explained earlier, the charges against the first appellant were bad in law because of the decisions in *Cooray* and *Yap Sing Hock*. Put simply, the first appellant was being charged with an offence unknown to the law, as it stood at the material date. Accordingly, the second appellant could not be guilty of abetting a non-existent offence. For this reason alone, both appellants were, in truth, guilty of no offence.

Second, upon the assumption that the charges against the first appellant were good (which is certainly not the case) the acquittal of the first appellant on the merits of his defence did not mean that the second appellant was automatically entitled to an acquittal as well. This is because of the law relating to the abetment of offences, a discussion of which now becomes necessary.

(A) The law governing abetment

The offence of abetment is defined by s. 107 of the Penal Code as follows:

> 107. Abetment of a thing.
>
> A person abets the doing of a thing who-
>
> First - Instigates any person to do that thing; or
>
> Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly - Intentionally aids, by any act or omission, the doing of that thing.
>
> Explanation I - A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

For present purposes, it is unnecessary for us to reproduce the rest of the section.

As may be seen, s. 107 prescribes the several ways in which an offence may be abetted. In the present case, it is clear that the prosecution relied upon the first limb of the section, namely, abetment by instigation. Indeed, the learned

Deputy who responded to these appeals quite properly conceded that this was the position.

The offence of abetment, when it consists of instigation, constitutes a separate and distinct offence. Consequently, an abettor who instigates the commission of an offence or conspires to commit it, may be convicted of abetment, notwithstanding that one who is charged with the principal offence has been acquitted. It is otherwise, where the abetment consists of intentional aiding: in such a case, acquittal of the principal offender must result in the acquittal of the abettor.

We find the statement of principle by Thomson J (as he then was) in *Kee Kim Chooi & Ors v. Public Prosecutor* [1952] MLJ 180, that abetment is a separate offence to be too wide and as not representing the law upon the subject. Instead, we would accept as correct the enunciation of the principle by the Supreme Court of India in *Faguna Kanta Nath v. The State of Assam* AIR 1959 SC 673 which accords, with the view we have expressed in the previous paragraph.

(B). Was there criminal breach trust?

The offence of criminal breach of trust, which the second appellant is said to have abetted is defined by s. 405 of the Penal Code as follows:

> 405. Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

In *Public Prosecutor v. Yeoh Teck Chye v. Public Prosecutor* [1981] 2 MLJ 176, 178, Wan Suleiman FJ explained the ingredients of the offence in the following passage:

> Harking back to first principles for a person to be guilty of the offence of criminal breach of trust he should be:
>
> (i) entrusted with property or dominion over the property,
>
> (ii) (a) that he should dishonestly misappropriate or convert it to his own use OR
>
> (b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of

(iii) (a) any direction of law prescribing the manner in which such trust is to be discharged OR

(b) of any legal contract made touching the discharge of such trust.

Before us, the learned deputy, Encik Yusof, fairly conceded that the prosecution's case against the first appellant was that he committed criminal breach of trust by dishonestly disposing of the Bank's moneys. As the argument developed, it became clear that the gravamen of the prosecution's complaint is that the moneys were released before the shares had been deposited and that this was contrary to the terms of the contract between the Bank and the borrower as reflected in the letter of offer dated 30 June 1986.

With respect, what was overlooked by all concerned in both Courts below, is reflected in the observation made by Shankar JCA in the course of the learned Deputy's response to the second appellant's appeal, namely, that the letter of offer was not cast in stone, but by its very terms was subject to variation. Again, as pointed out by Shankar JCA during argument, the decision by the Management Committee on 23 July 1986 to dispense with the shares rendered the failure to deposit them a non-issue.

In essence, the offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of the property in a particular way. That consent of the beneficial owner is a complete defence to the offence of criminal breach of trust is to found in the words "in violation ... of any legal contract, express or implied, which he has made touching the discharge of such trust".

The beneficial owner of property who entrusts it or dominion over it to another under an express or implied contract, for the purposes of s. 405, must retain the ultimate control over its use or disposal. If there is an express contract governing the discharge of the trust, then, it is a question of construing its terms to determine the nature and extent of the duty cast upon a person accused of having dishonestly dealt with the property. If the contract is implied, then it is a question of determining any term the law may properly imply into it.

Both cases involve a question of law: it is a question of law as to what the express terms mean; and its equally a question of law as to what the terms are of an implied contract. In our judgment, it is an implied team in every entrustment under the express or implied contract, referred to in s. 405, that the owner of property may give his express or implied consent to its use or disposal in a manner that differs from the original terms governing its use or disposal. Any other view of the matter would result in adversely affecting the rights over property of a beneficial owner conferred upon him by the general law.

Then the question arises, must there be prior consent? The learned Deputy, relying upon the decision in *Public Prosecutor v. Yeoh Teck Chye v. Public Prosecutor (supra)* submits that this question must receive an affirmative answer.

In *Yeoh Teck Chye*, the defence was that there had been express authority conferred upon the second accused to make the loans or alternatively, that the supreme authority of Bank Buruh had ratified the loan in question. Having held that there was no express authority, Wan Suleiman FJ, when delivering the judgment of the Federal Court went on to say as follows:

> We are satisfied that this ratification by the Management Committee and the Board of Directors must *prima facie* indicate that the supreme authorities of the bank far from confirming that accused 2 had the authority to grant the short term overdrafts were merely engaged in taking steps to protect the bank's interest, and to make the best out of a bad bargain, and possibly to regain the confidence of Bank Negara.
>
> As regards the effect of ratification on criminal liability two authorities were brought to our notice *viz. Yeow Fook Yuen v. Regina* [1965] 2 MLJ 80 and *Mangal Sen v. Emperor* AIR 1930 Lah 57. **From these authorities we are satisfied that ratification would not exonerate a criminal offence** and no authority we are aware of or which has been brought to our notice says otherwise.
>
> We therefore hold that the act of ratification is of no assistance to the defences.

In *Yeow Fook Yuen (supra),* the accused were charged and convicted of having committed, *inter alia,* criminal breach of trust of certain moneys, which had been taken as loans or advances. It transpired that, well after these loans or advances had been taken and police investigations had commenced, the executive council of the union had passed a resolution approving the loans and advances in question. It was argued that this subsequent approval was valid. When dismissing the appeal against conviction, Wee Chong Jin CJ said:

> The main defence of both appellants was that this sum of $7,500 was taken by the second appellant by way of loan or loans from time to time, that these loans were approved by the executive council of the union.
>
> It is clear that if the executive council of the union had given the first appellant prior authority to make advances or loans to the second appellant specifically, or to any paid servant of the union generally, the prosecution must fail. **The case for the prosecution is that there was no such prior authority given by the executive council of the union nor is it the case of both appellants that there was such prior authority or approval.**
>
> ...
>
> The trial Judge in his long and careful judgment after setting out the case for the prosecution and the case for the defence in this issue of knowledge or approval by the executive council of the union came to the conclusion that the

executive council were never informed of these so called advances or loans, never discussed them and never sanctioned the fact of their having been made until 15 October 1962 and in that connection accepted the evidence of Latiff a prosecution witness who was at all material times the president of the union.

With regard to the effect of the approval given by the executive council on the 15 October 1962 when it passed a resolution at a meeting specifically called to consider the matter of the advances taken by the second appellant the trial Judge came to the conclusion 'that the executive council has no power nor any authority to condone the criminal offences that had already been committed by the two appellants and which were then under investigation by the police.

...

It was next contended that the approval given by the executive council on the 15 October 1962 after these advances or loans was a valid and effective approval and afforded a complete defence in law in respect of the present charges. Counsel for the appellants was however unable to draw my attention, to any authority in support of his contention and I need only say that in my opinion the trial Judge was correct in rejecting this defence contention. (Emphasis added.)

It may be seen from the foregoing passages that no authority was cited for either proposition; that advanced by the learned District Judge, whose view was affirmed by the learned Chief Justice, or that advanced by the accused. Secondly, the ratification in that case came well after the police had commenced investigations. That is not the case here.

In *Mangal Sen (supra),* the accused Mangal Sen was convicted of an offence of criminal breach of trust in respect of certain moneys which he claimed were merely paper transactions. His other defence to the charge was that he had obtained a resolution of the bank's board ratifying the impugned transactions. The High Court, on appeal, unsurprisingly rejected the defence that the transactions in question were mere book entries and therefore only on paper. It also held the resolution relied upon by Mangal Sen to be *ultra vires* because the meeting at which it was passed lacked a quorum. It therefore transpired that there was in fact no valid resolution ratifying the impugned transactions.

With respect, we are unable to read these two cases as being authority for the proposition that a use or disposal of property entrusted under s. 405 of the Penal Code can **never** be ratified by its beneficial owner. In our judgment, whether there can be a valid consent subsequent to the impugned use or disposal depends upon the facts of each case. There may be cases where the ratification is but a cloak to cover up a dishonest act. This, indeed, was the position in *Yeow Fook Yuen*. In *Yeoh Teck Chye*, as the Court found, the true purpose of the ratification was to save Bank Buruh and to regain Bank Negara's confidence. In *Mangal Sen* there was an invalid ratification. In all these cases there was no genuine consent subsequent to the use or disposal.

But where facts emerge to show that there was true consent in its legal sense, the fact that it did not precede the use or disposal cannot, in principle, make the slightest difference to the question. Such subsequent consent would, in accordance with well-established principle of the law of agency, relate back to the use or disposal that is the subject of challenge. We emphasise that for the principle to apply, there must be present all those elements which would constitute consent in law.

In the present appeals, the authority to deal with the property of the Bank was vested in the Management Committee. There is no doubt that it was empowered to have dispensed with the shares *ob initio.* Once it made up its mind at its meeting on 23 July 1986, to dispence with the requirement that the shares should be deposited, the whole issue became academic. As was conceded by the learned deputy, in answer to a question put to him by Shankar JCA during argument, if the shares had been there from the beginning, no offence would have been committed.

(C) Was there abetment?

All that we have said thus far is sufficient to dispose of the second appellant's appeal: he was guilty of no offence for the reasons given. Encik Manokaran who appeared for the second appellant has also argued that there had been no proper judicial appreciation of the evidence on the issue of abetment. We think we owe it to the efforts of Counsel who has argued the appeal with some care to deal with the point raised.

The main evidence relied upon by the trial Court to convict the second appellant upon the charge of abetment is the testimony of the first appellant to the effect that he had been deceived by the second appellant into believing that all the documents were in order at the material time. But there is other evidence to negative culpability on the part of the second appellant.

Thus, in the check list which accompanied the accounting documents there is made mention of the fact that the shares were yet to be deposited. The second appellants' case is that he had made the relevant notation in the check list and the first appellant would have realised the true position if he had carefully studied the document. The very fact that the second appellant made the notation repels any suggestion of misrepresentation of the true position.

Encik Manokaran submitted that his client ought not to be blamed if the first appellant overlooked the notation. We are of the view that Counsel is correct in the submission he made. In the light of this telling evidence the learned Sessions Judge ought to have directed his mind sufficiently to the point taken by the second appellant. We must add, in fairness to the second appellant, that the evidence presented fell far short of establishing a case of abetment by instigation.

Unfortunately, the Sessions Court did not address itself sufficiently to the evidence in favour of the defence, especially the evidence in the form of contemporaneous documents, and instead concentrated its attention solely upon the evidence that was unfavourable to the second appellant. It is equally unfortunate that the learned appellate Judge also failed to address his mind to this point.

The approach adopted by the trial Court to the evidence before it amounts to a misdirection that has occasioned a miscarriage of justice. Therefore, quite apart from the points of law on which these appeals must succeed, the second appellant was entitled to an acquittal upon the factual merits of his case.

Conclusion

For the reasons given, we are of the view that the appellants ought to have been acquitted at the close of the case for the prosecution. The trial Judge was therefore wrong in ordering both appellants to enter upon their defence. On appeal, the learned appellate Judge was wrong in reversing the order of acquittal that had been made in the first appellant's favour by the trial Court and in dismissing the second appellant's appeal against conviction.

In the circumstances, we had no alternative but to allow these appeals and to acquit the appellants.

Postscript

In the interests of justice, we wish to make it quite plain again that the appellants in these appeals, whose names will no doubt figure in one or more of our law reports, ought not to have been convicted of any offence. They leave this Court without a stain upon their character.

We thank all Counsel who appeared in these appeals for their careful and well-researched submissions. We would, in particular, make special mention of the learned Deputy Public Prosecutor, Encik Yusof, who appeared for the respondent. Although he did not appear in either of the Courts below, his complete familiarity with the several documents, as well as passages in the evidence and their exact location amidst the voluminous records in these appeals, helped us immensely during argument.

Reported by W.A. Sharif